

Joint Committee on Boards, Commissions and Consumer
Protection

**BACKGROUND PAPER FOR
HEARING
JANUARY 5, 2005**

BOARD OF PSYCHOLOGY

BACKGROUND, IDENTIFIED ISSUES, AND QUESTIONS

**BRIEF OVERVIEW OF THE PROFESSION OF
PSYCHOLOGY AND THE BOARD OF
PSYCHOLOGY**

The California Board of Psychology (Board) has jurisdiction over those who are engaged in the practice of psychology. Psychologists differ from psychiatrists chiefly in that psychiatrists train for, and are licensed as, Medical Doctors (M.D.), and are therefore regulated by the Medical Board of California, while psychologists (as well as registered psychologists and psychological assistants, also regulated by the Board) are more particularly trained in the profession of psychology.

The Board regulates psychologists, registered psychologists, and psychological assistants.¹ Only licensed psychologists can practice psychology independently in the private sector in California. Registered psychologists are registered to work and train under supervision in non-profit agencies that receive government funding, and registered psychological assistants are employed and supervised by a qualified licensed psychologist in private settings.

Regulation of the profession of psychology began in with the Certification Act of 1958. While the Certification Act protected the title “psychologist,” it did not take into consideration the interests of the consumers of psychological services. Later, the regulation of the profession evolved when the Legislature recognized the potential for consumer harm by those practicing psychology and shifted the focus of the regulation of the profession to protection of the public.

¹ This description is taken, in large part, from the Board’s Sunset Review Report. For more detailed information, refer to that report’s much more extensive discussion.

This redirection resulted in legislation in 1967 that protected the title of “psychologist,” defined the practice, and required licensure in order to practice legally. During these early licensing days, the board was an “examining committee” under the jurisdiction of what was then the Division of Allied Health Professions of the Medical Board. During the 1970s, the Psychology Examining Committee gradually became more independent, and began taking responsibility for its own operations including the authority to adopt regulations and administrative disciplinary actions without the endorsement of the Medical Board. The Psychology Examining Committee officially became the Board of Psychology in 1990 (AB 858 (Margolin)).

Over the past several decades, there have been amendments to the licensing law that have enhanced the Board’s ability to protect the public through appropriate discipline of those licensees who violate the licensing law. For example, the Board’s ability to appropriately discipline those psychologists found guilty of sexual misconduct was greatly enhanced in 1994 when the Legislature mandated administrative law judges (ALJs) to recommend the revocation of a license as part of their proposed decisions in sexual misconduct cases. The Board determined that revocation was the only appropriate discipline for such acts. It has adopted this “zero tolerance” philosophy regarding sexual misconduct because revocation is the only way consumers of psychological services can be protected from the psychologist who would engage in such behavior.

BOARD MEMBER	APPOINTMENT TYPE	APPOINTMENT DATE	TERM EXPIRATION
Howard Adelman, Ph.D.*	Licensed Member	06/01/02	06/01/07
Ellen S. Graff, Ph.D.*	Licensed Member	09/25/03	06/01/06
Jacqueline Horn, Ph.D.*	Licensed Member	06/01/02	06/01/04
Sylvia Jewell Johnson**	Public Member	08/28/03	08/28/07
James McGhee*	Public Member	09/25/03	06/01/06
Myra Scott Reifman*	Public Member	06/01/02	06/01/04
Ronald Ruff, Ph.D.*	Licensed Member	06/01/02	06/01/04
William Tan***	Public Member	02/01/02	02/01/06
William Thomas, Ph.D.*	Licensed Member	06/01/02	06/01/07

* Appointed by the Governor, ** Appointed by the Senate President Pro Tempore,

*** Appointed by the Speaker of the Assembly

PRIOR SUNSET REVIEW

The Board was last reviewed in 1998. The Committee recommended continuing the regulation of the practice of psychology, and determined that an independent board was the appropriate means of accomplishing this.

Among the significant changes the Committee recommended were:

- That the eight-member board be expanded by one public member so that it would have the more usual structure of an odd number of members;
- That the board be authorized to enact standards of ethical conduct;
- The statutory provisions relating to social/sexual relationships of psychologists with former patients be clarified;
- “Incompetence” should be added as a category for disciplinary action;
- A felony conviction and resulting incarceration should result in the immediate suspension of a license; and
- Licensed psychologists should be required to display their licenses or registrations in a public area, and to notify patients who they can contact if they have any questions or complaints regarding the licensee.

SIGNIFICANT CHANGES SINCE LAST REVIEW

Since the last sunset review, the Board states that it has made the following major changes:

1. Consumer complaint form available online effective April 1998
2. Development and implementation of the California Jurisprudence and Professional Ethics Examination (CJPEE) became effective January 1999
3. Assumed probation monitoring responsibility from the Medical Board of California (MBC) in 2000
4. Online license verification lookup available to consumers effective April 2000
5. AB 400, among other things, eliminated the equivalency provision regarding the doctoral degree required for licensure effective January 1, 2001
6. SB 1554 (Chapter 836, Statutes of 2000) made specific the following changes:
 - B&P Code section 2969 added penalties for failure to provide medical records and for failure to comply with court orders and became effective January 1, 2001
 - B&P Code section 2960 was corrected to include prohibition of sex with former patients within two years following termination of therapy became effective January 1, 2001

7. Mandated laws and ethics course every two years for all licensees effective January 1, 2001
8. Transitioned from the paper/pencil version of the Examination for Professional Practice in Psychology (EPPP) to the computer administered EPPP effective September 1, 2001
9. Allowed applicants for licensure to take the EPPP upon receiving the doctoral degree and completing 1,500 hours of supervised professional experience effective September 1, 2001
10. Elimination of the board's Oral Examination effective January 1, 2002
11. Online licensing for initial and renewal license for psychologists effective 2002
12. Applications available online effective 2002
13. Mandated supervision course every two years for those licensees who supervise trainees effective January 1, 2003
14. Assumed complaint processing responsibility from MBC effective July 2003
15. Established a toll-free complaint line for consumers effective July 2003
16. AB 1669 (Chu) (Chapter 777, Statutes of 2003) mandated requirements for licensees who evaluate peace officer's emotional and mental health or performing peace officer fitness for duty evaluations in 2004 (becomes effective January 1, 2005)

NEW ISSUES

ISSUE #1: Whether the Board should be continued.

Issue #1 question for the Board: *Should California continue regulating the profession of psychology?*

Background: Psychologists are licensed in all 50 states, Guam, the U.S. Virgin Islands and all Canadian Provinces. The potential for harm to consumers in this profession is great. Psychological services involve a highly intimate process in which patients discuss very personal feelings and details of their lives with a licensed psychologist, in an attempt to resolve severe conflicts from the past, deal with highly traumatic incidents, and develop new patterns of behavior to live their lives more effectively. These patients are highly vulnerable and many are seeking therapy to deal with the most confidential and emotional issues, such as prior incidences

of sexual abuse and rape. Professionals in this field necessarily provide their services behind closed and sometimes locked doors are therefore bound by strict tenets of confidentiality.

In that context, individual patients who may have problems with their psychologist require, more than many other kinds of consumers, an independent regulator to help deal with the professionals neutrally, but who have a paramount duty to act in the public interest.

ISSUE #2: Whether the Board should have authority to discipline licensees for incompetence.

Issue #2 question for the Board: *Is the Board currently authorized to discipline licensees for incompetence? If not, should the Board be given this authority?*

Background: B&P Code section 2960 currently authorizes the Board to discipline licensees for a number of violations, including, “Functioning outside of his or her particular field or fields of competence as established by his or her education, training, and experience,” (subdivision (p)) and gross negligence (subdivision (j)).

The Board has struggled with the question of whether incompetence falls within either of these provisions. A licensee may be practicing within his or her “field of competence” (i.e., the licensee has passed the Board’s examinations) but be doing so incompetently in a particular case. Thus, the prohibition in subdivision (p) may be interpreted as not giving the Board authority to discipline that licensee, and the higher standard of “gross” negligence in subdivision (j) may not be met. The legal concept of incompetence is somewhat different from that of subdivision (j)’s prohibition of gross negligence, in that a licensee may fall below the level of competent practice without being grossly negligent.

The Board has noted that it feels it would be appropriate for the Committee to recommend a clarifying amendment to B&P 2960 which would add “incompetence” as a separate prohibition just as it is with licensed physicians.

ISSUE #3: Whether the Board should be more actively involved in repayment of the 2002/03 loan it made to the state’s General Fund.

Issue #3 question for the Board: *Should the Board be required to reduce its fees in order to avoid a lawsuit by licensees over the loan that was made to the General Fund in 2002/03?*

Background: [Note: This issue is examined in more detail in the Committee’s Cross-Cutting Issue paper. Briefly, in 2002 and 2003, nineteen boards in the Department of Consumer Affairs (DCA) were required to “loan” the General Fund over \$200 million from their segregated, special funds. Those funds are segregated from the General Fund specifically because they are comprised of fees paid by licensees, and those fees are limited to use only for regulation of the licensees’ profession, and for no other, more general purpose. The discussion here looks more specifically at this issue as it relates to the Board of Psychology.]

In 2002/03, the Board loaned the General Fund \$5,000,000. In its current projected budgets, the Board does not show any repayment of that loan. According to the Board, it “was not consulted at any level or at any time regarding the \$5,000,000 loan to the General Fund taken from the Psychology Fund.” The Board has been advised that, only if “need arises” would the Board be permitted to request any portion of those funds be repaid.

This raises some serious questions. License fees are not considered “taxes” for one key reason – they are available solely for uses directly related to regulation of the very licensees who pay them. If they are used for any other purpose, those fees have been transformed into general taxes, and, quite literally, the licensees have been subjected to a tax increase not imposed upon other citizens.

This problem is particularly acute with the Board of Psychology. At the time the loan was made (or, in the Board’s words, “taken”) the Board had a rulemaking file in the final stages of review at the Office of Administrative Law which would have reduced the renewal fees for psychologists from \$400 to \$275. This would have dealt with a substantial reserve the Board had accumulated. However, when the Board learned of the “loan” that the General Fund would be taking, it withdrew the rulemaking file from OAL.

This illustrates two key issues with these loans. First, the Board was acting responsibly in dealing with its increasing fund reserves by seeking to reduce fees imposed on licenses. But psychologists who stood to see a reduction in their renewal fees of more than 40 percent saw that promise eliminated.

The second, more complicated issue has to do with repayment. If this was truly a loan that the General Fund will repay to the Board, the licensees would have no legal objection. However, it is unusual to say the least when a borrower has the authority to determine when and under what terms the funds it borrowed will be repaid. The Board significantly notes that the General Fund will repay the loan “if there becomes a need” for the money. But the DCA and Finance have some statutory control over the Board’s financial status, and can create – or prevent – that need from ever arising, if “need” means financial distress. Thus, the ability to raise or lower licensing fees gives the Board the ability to avoid, entirely, repayment of the loan – as the Board has demonstrated already by withdrawing its fee-reduction regulations.

The criterion of “need,” coupled with the “borrower’s” ability to prevent any such need from arising could give licensees, not to mention a court, a strong reason to believe that the Board’s licensees in 2002/03 were unfairly taxed by the state to help ease a budget crisis.

ISSUE #4: Whether the public could benefit by being able to learn from the Board’s website of non-licensees who have been convicted of the unlicensed practice of psychology.

Issue #4 question for the Board: *Should the Board be given statutory authority to prominently post relevant information on its website to alert the public to non-licensees who have been convicted of the unlicensed practice of psychology? Doesn’t the Board have such inherent authority already, given that it already lists some of those individuals?*

Background: When the public visits the Board’s website, they may search for information about Board licensees, and find out if they have any record of discipline or criminal violations related to the practice of psychology. Information about disciplinary actions related to specific licensees will show up when that licensee’s name is displayed.

In addition, the Board investigates instances of the unlicensed practice of behavioral science. However, since anyone practicing without a license is, by definition, not a licensee, they do not technically fall within the Board’s jurisdiction. Therefore, if the Board finds adequate evidence of unlicensed practice, it must refer the case to a local District Attorney for prosecution.

Thus, it is possible that the current system may create unnecessary consumer confusion. Because the licensee search feature on the Board’s website contains information about licensees, any member of the public who looked up the name of an unlicensed person on the Board’s web site would be able to learn that that person does not have a license. However, the consumer would have no idea that an unlicensed person had already been convicted of unlicensed practice. Especially knowledgeable or motivated consumers may be able to find this information, however. On a separate section of the Board’s website apart from the License Search feature – under the broad category of Enforcement, behind a link to “Board Actions” – the Board lists all of those it has taken action against, and includes those who have had Board actions taken against them based on unlicensed practice. Thus, the information is available, but is not linked in any way to the key feature most consumers would be using at the time this information would be most relevant to them.

This problem is especially acute for those non-licensees who continue practice after a criminal conviction.

There is no public policy reason to exclude those who have been criminally convicted of unlicensed practice from the database of the Board with jurisdiction over that practice. And there are at least two sound reasons in favor of such inclusion.

First, this would be extremely relevant and important information for consumers who may have contact with such people. Few consumers who use the Board’s license search feature would also do an additional search for Board actions – or for convictions in the state’s courts, which would also have this information -- though this information is publicly available. The Board is clearly in the best position to compile that information with the information it already has on its licensees. This is particularly true if the Board initiated the action against the unlicensed party.

Second, and perhaps even more important, the Board would benefit from this kind of posting. If someone is continuing to practice after having been convicted of unlicensed activity, consumers who would come into contact with that person would be ideally situated to let the Board know about the continuing activity of known wrongdoers. In effect, this sort of feature would allow affected consumers to be the Board’s investigators. The names of those convicted of unlicensed practice could be displayed in a different color from licensees, with a flag to the consumer to report this person to the Board if they are continuing to practice without a license after a prior conviction.

The largest part of the problem is that for its license search function the Board uses the DCA search engine, and the DCA keeps only information about licensees, based on their license

number. However, as noted above, there is no public policy reason to exclude from this database those who have already been convicted of unlicensed practice, and countervailing public policy reasons in favor of such inclusion. As with all technological advancements, this would require some creative work on the part of DCA's technology staff.

There may also be ways to provide this information to consumers without having to use the DCA database. One board has noted it might be possible, for example, to have a link on the page listing the results of a licensee search informing consumers that if the person they are looking for is not listed, they can click the link to go to a page on the Board's website listing those convicted of unlicensed activity.

In light of the benefits to consumers, it should be well worth the time and effort to devise some solution to this problem.

ISSUE #5: Restitution –Whether the Board should have the authority to order restitution to consumers who have been seriously harmed by licensees.

Issue #5 question for the Board: *Is it appropriate for the Board to have authority to order restitution to consumers who have been seriously harmed by licensees?*

Background: During the 2000 Sunset Review, the DCA recommended that all boards examine their authority to order restitution to consumers, and develop policies to execute that authority. This was to be pursued by each individual board, and seems to have assumed that this issue would arise during Sunset Reviews of boards in future years.

The Board of Psychology does not, itself, have the ability to order restitution to consumers harmed by licensees. However, the Board does have authority to request such an order from a Superior Court. (B&P Code sec. 125.5 (b)) The number of cases that the Board takes to Superior Court, however, is relatively small, compared to the number it handles in administrative proceedings.

Restitution is a very particular kind of remedy. It is a form of equitable relief that (in the present context) would require a licensee who has harmed a consumer to return any unjust enrichment or benefit he has gained from the harm he caused. It is different from, for example, punitive damages designed to punish a licensee. In the earlier common law, restitution meant “the return or restoration of a specific thing or condition.” (Cal.Jur.3d, Restitution, sec.1, page 398)

However, there is also a broader modern “understanding” of restitution, which could sweep in other forms of damages. As explained in California Jurisprudence 3d,

“In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.” (Cal.Jur.3d, Restitution, sec. 1, page 398)

This broader definition may seem to include a more typical understanding of general damages (such as lost wages) that would make the consumer whole. This is the sense DCA seemed to indicate in its 2000 recommendation. Such a definition would differ from the traditional understanding that restitution is based on restoring to the injured party a benefit that a wrongdoer might unjustly keep for himself.

B&P Code sec. 125.5 does not specify which of these definitions it intends, and no published case has apparently interpreted it. However, in light of the fact that restitution is the only form of monetary relief for victims specifically mentioned, it would appear that a strongly defensible reading of the term in that statute would include the broader definition; any other understanding might appear to leave a court without specific authority to award any other kind of damages, and the narrowest definition could leave injured consumers without full redress in court.

Under either of these definitions, however, it would benefit the public if the Board itself had the legal authority to award restitution to harmed consumers directly. The Board should have a broad array of available measures of damages, from which it may pick and choose in fashioning the most appropriate remedy for a particular case. Indeed, the Board notes that it has the ability, in appropriate cases, to “seize the opportunity” to obtain restitution, (Board’s Sunset Review report, page 30), for example as part of a stipulated settlement with a licensee. This is because it can negotiate settlement terms based on anything the licensee will agree to, whether listed in the Board’s statutory mandate or not.

When licensees will not agree to a settlement, however, it is in the Board’s interest to have the largest possible number of options available to it, in order to assure that all possible kinds of harm may be remedied. It may be considered illogical for the Board to have this authority as a contractual matter in settlements (due to the Board’s inherent power to settle cases on any terms agreeable to both parties), but lack the identical authority as part of its ordinary, statutory tools. For example, the State Contractors License Board has authority to make sure that “. . . all loss caused by the act or omission for which the license was revoked has been fully satisfied.” (B&P Code sec. 7102)

Moreover, particularly in light of the fragile nature of the consumers the Board of Psychology deals with, requiring them to file an *additional* action in civil court to obtain restitution could appear unseemly or even cruel – particularly in light of the fact that the Board could include such an award as part of an already-pending action against the licensee if given the statutory authority. To the extent the Board might not feel such a charge in a particular case was appropriate, the Board could, of course, omit a request for restitution in that case.

In order to avoid making each administrative action a mini-civil trial, however, and to assure the Board has adequate flexibility, this remedy should be reserved for the most serious cases, with the Board having the authority to determine in which cases it would be appropriate.